

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-1790

In the Supreme Court of the United States

OCTOBER TERM, 1976

SIMON BRACH, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 1, 1976. A petition for rehearing was denied on May 14, 1976 (Pet. App. 3a). The petition for a writ of certiorari was filed on June 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether goods stolen by petitioner were an "inter-state or foreign shipment," within the meaning of 18 U.S.C. 659, at the time they were stolen.
2. Whether the district court properly instructed the jury on the commerce element of 18 U.S.C. 659.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of stealing goods worth approximately \$50,000 from a shipment travelling in foreign commerce, in violation of 18 U.S.C. 659. Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed without opinion.

On March 5, 1975, Israel Follman, a truck driver employed by the Fried Trading Company, drove a Fried truck to Pier 12 in Brooklyn, New York, to pick up a shipment of car stereo units that had just arrived from Japan. After Follman presented the proper documents to customs officials, he had the stereo units loaded onto the truck and drove the truck back to the vicinity of the Company; he parked the truck approximately 50 feet from the Company's premises (App. 23a-30a).¹ He delivered two cartons (from the shipment of 166 cartons) to Company technicians, so that they could determine whether the merchandise was defective. Defective merchandise could be returned to the seller immediately (App. 30a-33a). When Follman returned to the street approximately ten minutes later, the truck was missing (App. 33a).

Petitioner, a member of the family that owns and operates the Fried Trading Company, was arrested for stealing the truck. Petitioner confessed and stated that he "fenced" the stolen stereos for \$20,000 (App. 91a-104a). At trial petitioner again admitted taking the truck (App. 193a-194a); he claimed that he had done so because of a dispute with his family over his right to a share of the Company's profits (App. 195a-198a).

¹"App." designates petitioner's Appendix in the court of appeals.

ARGUMENT

1. Petitioner contends that the stereo units were not a "foreign shipment" within the meaning of 18 U.S.C. 659 when he stole them.

a. Petitioner first urges (Pet. 8-10) that because the shipment was loaded at the pier onto a truck owned and operated by the consignee of the goods, it lost its foreign character at that moment. But "[a]n interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered." *United States v. Yoppolo*, 435 F. 2d 625, 626 (C.A. 6); *United States v. Gimelstob*, 475 F. 2d 157, 164 (C.A. 3), certiorari denied, 414 U.S. 828. Cf. *Brown v. Maryland*, 12 Wheat. 419, 442-443 (implying that a thing remains in foreign commerce while still in the warehouse of the importer); *Michelin Tire Corp. v. Wages*, 423 U.S. 276. It is not known what the "final destination" of the stereo units may have been, but their immediate destination was the Fried Trading Company's warehouse, and they had not yet reached even that destination. Wherever the "final destination" was, it was not Pier 12 in New York. The fact that the goods were being transported by their owner on the last leg of their international journey at the time of the theft did not remove them from the protection of Section 659. *United States v. Astolas*, 487 F. 2d 275, 280-282 (C.A. 2), certiorari denied, 416

U.S. 955; *Winer v. United States*, 228 F. 2d 944 (C.A. 6), certiorari denied, 351 U.S. 906.²

b. Petitioner alternatively argues (Pet. 10-12) that the goods lost their foreign character when Follman parked the truck on the street near the Fried warehouse and carried two of the boxes to the warehouse. But petitioner stole the boxes remaining in the truck, not the boxes taken to the warehouse. The units simply never arrived at their intended destination; they were diverted by petitioner, and the fact that they came within 50 feet of their destination is immaterial. *United States v. Astolas*, *supra*; *United States v. Cousins*, 427 F. 2d 382 (C.A. 9). Indeed, Follman testified that he removed the two boxes so that company personnel could determine whether the shipment was defective and whether to accept the ship-

²Petitioner attempts to portray a conflict among the circuits (Pet. 9-13), but there is none. Most of the cases cited by petitioner (e.g., *United States v. Burton*, 475 F. 2d 469 (C.A. 8), certiorari denied, 414 U.S. 835) (see Pet. 9) affirm convictions under Section 659, and so do not stand for the proposition that petitioner's conviction would have been reversed by those courts. There appears to be a consensus that interstate or foreign commerce continues until the shipment reaches its destination. The apparent disagreement upon which petitioner dwells concerns not the general principle but only its application to particular facts; identifying the "destination" of particular goods may be a difficult question about which reasonable men may differ, but such problems of identification on particular facts do not require resolution by this Court.

These observations also demonstrate why, contrary to petitioner's assertion (Pet. 11-13), there is no conflict within the Second Circuit. *Astolas*, *supra*, upon which petitioner relies (Pet. 11-12), made it clear (487 F. 2d at 278-282) that the critical inquiry under Section 659 is not how many vehicles transport the goods or by whom the vehicles are owned, but whether the goods have reached their final destination before being stolen. In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.

ment or return it. This is persuasive evidence that its journey had not yet come to an end.³

2. Petitioner contends (Pet 15-19) that the district court improperly restricted defense counsel's closing argument on the issue whether the goods constituted a foreign shipment at the time they were stolen and erroneously instructed the jury on the same issue.

The crux of petitioner's argument apparently is that the jury should have been instructed that they could find that the goods lost their foreign character when they were loaded onto the Fried truck at the pier, and that he should have been permitted to argue that theory to the jury during closing argument. There is no right, however, to argue erroneous legal theories to the jury, and for the

³Petitioner contends (Pet. 10) that the holding below conflicts with *O'Kelley v. United States*, 116 F. 2d 966 (C.A. 8). That decision has not been followed by other circuits (e.g., *Winer v. United States*, 228 F. 2d 944 (C.A. 6), certiorari denied, 351 U.S. 906; *United States v. Concepcion*, 419 F. 2d 1263 (C.A. 2)) and has been virtually abandoned even by the Eighth Circuit. See *Chapman v. United States*, 151 F. 2d 740 (C.A. 8). In *O'Kelley* a carload of sugar originating in Louisiana was set out on a spur track at a railroad station in Arkansas. The next day, the consignee of the sugar broke the car seal, removed approximately one-sixth of the shipment, and replaced the seal with its own padlock. When the consignee returned to complete the unloading the next day it discovered that a small quantity of the sugar had been stolen. In holding that the sugar was no longer in interstate commerce at the time it was stolen, the court concluded that the consignee had "accepted" the shipment by breaking the seal, removing part of the shipment, and by locking the car with a private padlock. Confronted with virtually identical facts four years later in *Chapman*, the Eighth Circuit distinguished *O'Kelley* on the ground that the railroad car involved in *Chapman* had been resealed by the railroad company after the consignee had removed part of the shipment and accepted delivery. We doubt that *O'Kelley* would be followed by the Eighth Circuit today even on its own facts.

reasons we have discussed above the transfer of the stereo units to the Fried truck was not the end of foreign commerce.

Petitioner relies on a battery of cases (Pet. 16-18) for the proposition that the jurisdictional elements of the statute present questions of fact for the jury. We agree. The judge instructed the jury that it must acquit petitioner if it concluded that Fried Company had assumed "such complete possession and dominion" of the truck and its contents at the time and place of the theft that the goods had been delivered and were no longer in transit (Pet. App. 7a). The district court was not required to go further and give an instruction based upon petitioner's erroneous construction of Section 659.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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